# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 25, 2003 |
| v | No. 242721<br>Saginaw Circuit Court |
| JEFFREY FREDERICK QUADERER,<br><br>Defendant-Appellant. | LC No. 01-019901-FH |

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree child abuse, MCL 750.136b(2), and was sentenced to ten to fifteen years' imprisonment. This case arises from injuries defendant inflicted on his girl friend's eight-month-old son, including bite marks, puncture wounds, and broken bones. We affirm.

Defendant first contends that the trial court erred by admitting the bite-mark evidence without first conducting a *Davis-Frye*[1] hearing. A trial court's decision to admit or exclude expert testimony is reviewed on appeal for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 224; 530 NW2d 497 (1995). The *Davis-Frye* hearing requirement applies only to new scientific principles or techniques. The proponent of scientific evidence that has been judicially recognized as generally accepted in the relevant scientific community is not required to meet the *Davis-Frye* standard. *People v Tanner*, 255 Mich App 369, 395; 660 NW2d 746 (2003); *People v Haywood*, 209 Mich App 217, 221-224; 530 NW2d 497 (1995).

The science of bite-mark analysis has gained general acceptance in the scientific community. The trial court need not conduct a hearing regarding its general acceptance before it will admit a dental expert's bite-mark comparison testimony. *People v Marsh*, 177 Mich App 161; 441 NW2d 33 (1989). *Marsh* is not binding precedent on this Court, as defendant points out, because it was decided before November 1, 1990. MCR 7.215(I). However, the analysis in *Marsh* is persuasive that bite-mark evidence has gained general acceptance in the scientific community. Further, defendant's own expert testified that he too used bite-mark identification

[1] *Frye v United States*, 293 F 1013 (DC Cir 1923); *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955).

but was unable to come to any opinion with respect to whether defendant was the biter. Finally, defendant fails to show that the analysis in *Marsh* has been undercut or overruled by subsequent opinions. Therefore, the trial court did not err by admitting bite-mark evidence without first conducting a *Davis-Frye* hearing.

Defendant next claims that the trial court abused its discretion by allowing an expert to state legal conclusions, specifically that the child had been "systematically, intentionally hurt" and "tortured." The admissibility of expert testimony is reviewed on appeal for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

"If the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." MRE 702. Defense counsel argues that Dr. Guertin exceeded the scope of permissible testimony for an expert because he was allowed to state that two elements of the crime had been satisfied. However, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704. As director of the Pediatric Intensive Care Unit and the physician member of the Child Safety Program at Sparrow Hospital, Dr. Guertin had knowledge about the type of injuries children sustain in the natural course of their day. Dr. Guertin testified that, in his opinion, the injuries to the child were not consistent with accidental injuries a child could inflict on himself. Dr. Guertin stated that, in his opinion, the child had been "systematically, intentionally hurt."

Defendant also objected to Dr. Guertin's opinion that the actions against the child in this case constituted torture. Specifically, Dr. Guertin said, "[T]o do something that would intentionally—obviously would be terribly painful, that is—this child was tortured in my opinion." Defendant argues that the word "torture" encompasses serious physical harm, another element of the offense of child abuse.

We conclude that Dr. Guertin's testimony was proper in this case. He did not state any legal conclusions, nor did he testify with respect to defendant's guilt or innocence. He merely testified with respect to the injuries he had observed, the extent of those injuries, and how he believed those injuries could have occurred. This testimony aided the jury in determining if these types of injuries could have been caused by accident and whether the child had suffered serious physical harm. Therefore, the trial court did not err by allowing Dr. Guertin's testimony.

Defendant next argues that the trial court did not provide substantial and compelling reasons for departing from the sentencing guidelines. We disagree.

Any factor relied on by the trial court in departing from the statutory sentencing guidelines must be objective and verifiable, and this Court reviews the trial court's determination of the existence of any such factor for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003) (*Babcock*), citing *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000) (*Babcock I*). Whether a particular factor is objective and verifiable is reviewed as a matter of law. *Id.*, quoting *Babcock I*, *supra* at 76. The trial court's determination that the

objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence are reviewed for an abuse of discretion. *Id*. at 264-265.

The child abuse in this case occurred on February 14, 2001; therefore, the statutory sentencing guidelines apply. MCL 769.34(1) and (2). The trial court departed from the minimum sentencing guidelines' range of 57 to 95 months and set the minimum sentence at 120 months. The trial court must impose a minimum sentence within the guidelines' range unless a departure from the guidelines is permitted. MCL 769.34(2). A court may depart from the guidelines if it has substantial and compelling reasons for that departure and states the reasons on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). Substantial and compelling reasons justifying departure should "keenly" and "irresistibly" grab the court's attention, must be "of considerable worth" in determining the length of a sentence, and "exist only in exceptional cases." *Babcock, supra*, 469 Mich at 257 quoting *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). In this case, after deviating from the minimum guidelines' amount, the trial judge stated:

> I'm doing it, first of all, in the 17 years I've been on the bench there have been very few cases that shock me, but this one did. There was no sensible reason for what happened here. Any one of the multiple injuries to the child could have resulted in a conviction for this offense. The punctures, the broken ribs, the broken clavicle, the bites, the pinch marks, any one of these could have been classified as a victim of child abuse. They all occurred.
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> Further, I have to note for the record here that you had a prior conviction. In this case I have no doubt that alcohol had a severe impact on what you did. On the previous case you had one where you were involved in alcohol and another incident with a minor occurred, and it seems like bad things happen when you are around minors and alcohol. I don't think we can trust you.

We are satisfied that the extent of the victim's injuries and the defendant's previous convictions are not only objective and verifiable factors, but also constitute substantial and compelling reasons for departure from the guidelines.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski